No. 82-2113

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ROBERT D. H. RICHARDSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION OF PETITIONER FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF

ALLAN M. PALMER
1707 N Street, N.W.
Washington, D.C. 20036
(202) 785-3900

Counsel for Petitioner

March 23, 1984

THE CASILLAS PRESS, INC. – 1717 K Street N. W. – Washington, D. C. – 223-1220

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-2113

ROBERT D. H. RICHARDSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION OF PETITIONER FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF

The intensity of questioning at oral argument precluded our presenting to the Court much of what we had anticipated or, any rebuttal. We deem two matters – not in our briefs – of such import, however, that their presentation now would be useful, we believe, to the Court's resolution of the case. The material refers directly to the issue of whether or not a prior *judicial determination* of insufficiency is necessary before our double jeopardy claim may be considered; a seemingly critical issue, judging from oral argument.

Wherefore, we respectfully request that Petitioner's motion for leave to file a supplemental brief be granted.

Respectfully submitted,

ALLAN M. PALMER
1707 N Street, N.W.
Washington, D.C. 20036
(202) 785-3900

Counsel for Petitioner

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-2113

ROBERT D. H. RICHARDSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF

I

In support of the claim that it is only a *judicial determination* of insufficiency that bars retrial, the government relied upon the holding in *Greene v. Massey*, 437 U.S. 19 (1978), for "confirmation that this interpretation of *Burks* is correct." (Br. 27) In *Greene*, the government observes, the Court considered the effect of a Florida Supreme Court decision reversing a criminal conviction on the *apparent* grounds of insufficiency of the evidence. The Court ultimately remanded to the court of appeals, which would be in a better position to interpret the Florida ruling.

> "But if petitioner's reading of *Burks* were correct, then the actual *holding* of the Florida Supreme Court would be irrelevant; the dispositive question would be whether the evidence at the first trial had in fact been insufficient. That the Court did not consider the question of actual insufficiency at all in *Greene,* or suggest that the court of appeals do so on remand, confirms that the right not to be retried under *Burks* arises solely as a result of judicial determinations of insufficiency – not mere failures of proof by the government. (Br. 27)

Judge Scalia dissenting herein, also espoused this very reasoning in support of his comparable position (Pet. App. 26a).

In the closely analogous case of *Tibbs v. Florida,* 457 U.S. 31 (1982), however, the Court did what it could only do if we are correct, *i.e.,* at n. 21 it pierced the Supreme Court of Florida's construction of its prior opinion and independently evaluated the evidence to see whether or not it was legally sufficient under *Jackson v. Virginia,* 443 U.S. 307 (1979).

> "Any ambiguity in *Tibbs I,* finally, was resolved by the Florida Supreme Court in *Tibbs II.* Absent a conflict under the Due Process Clause, *see n. 21, supra,* that court's construction of its prior opinion binds this Court.[24] 457 U.S. 46-47. (Emphasis supplied)[1]

---

[1]At note 24, the Court alluded to its prior remand in *Greene v. Massey, supra,* and quoted therefrom, *inter alia,* "We even suggested that the Court of Appeals might 'direct further proceedings in the District Court or' . . . ." A clear reference to the authority on remand to pursue an evaluation of the evidence.

Accordingly – under compulsion of the government's reasoning – it is abundantly clear that the right not to be retried under *Burks* arises not merely as a result of judicial determinations of insufficiency – but upon actual failures of proof by the government.[2]

II

Should a convicted defendant's motion for a new trial be granted pursuant to Rule 33,[3] the government's theory precludes review of his insufficiency of the evidence claim. Since – according thereto – there has been no judicial determination of insufficiency nor the right to obtain one, the government could now increase its evidence and secure a second conviction without ever being held accountable for its failure of proof at the first trial. But, had the district court denied the new trial motion and the defendant appealed his conviction, *Burks* requires him to be set free. The only theory to support a different result if the motion is granted, is one grounded in the notion that by moving for a new trial, the defendant somehow waived his right to secure a judgment of acquittal. This certainly cannot be the intent of counsel who, although he believes the evidence insufficient, further seeks to protect his client to the fullest extent possible, by also moving for a new trial.

We need look no further than this Court's holding in *Burks* to explode the notion that a waiver occurs thereby.

---

[2]Because the validity of our double jeopardy claim was originally conceded by the government, Br. 31 n. 25, our brief did not address this issue and, we only discovered the *Tibbs* material after our reply brief was filed. We are somewhat surprised, however, that the government did not include this quote from *Tibbs* in respondent's brief, which clearly contradicts its stated position.

[3]For whatever reason, *e.g.*, improper closing argument by the prosecutor, a prejudicial news account read by the jurors, etc.

> "In our view it makes no difference that a defendant has sought a new trial as one of his remedies, or even as his sole remedy. It cannot be meaningfully said that a person "waives" his right to a judgment of acquittal by moving for a new trial." 437 US. at 17.

It is also certain that the right to hold the government accountable to its burden of proof on appeal, cannot vacillate with whether or not the trial court grants the new trial motion. For if it did, new trial motions would never be filed when counsel truly believed the evidence was insufficient, even though he also believed that he had a valid new trial claim, for fear of losing his right to contest the sufficiency of the evidence. The rights secured to criminal defendants by Rule 33, cannot be conditioned by so heavy a burden as the need to choose between an appeal or the filing a new trial motion. It is therefore not only obvious, but also fair, that the right to contest the sufficiency of the evidence is not lost by the granting of a motion for a new trial.[4] While we, of course, never had to face this dilemma because of the hung jury, petitioner's position is precisely the same as a convicted defendant granted a new trial, insofar as his right to contest the sufficiency of the evidence is concerned.

The bottom line is, *Burks* makes clear that there is no magic in the concept of a *conviction* when it comes to holding the government accountable under the Fifth Amendment to but "one bite at the apple."

Judge Wilkey summed it up correctly in the court below when he observed:

---

[4]Of course, if the district court vacates a conviction for insufficient evidence and enters a judgment of acquittal, the government can appeal from that judicial determination of insufficiency. *United v. Singleton*, 702 F.2d 1159 (D.C. Cir. 1983).

"[T]he double jeopardy clause is violated if the government has a full and fair opportunity to convict a defendant, fails to produce enough evidence to sustain its constitutional burden to present legally sufficient evidence, and is then given another opportunity to obtain a conviction" (Pet. App. 14a)

Respectfully submitted,

ALLAN M. PALMER
1707 N Street, N.W.
Washington, D.C. 20036
(202) 785-3900

Counsel for Petitioner